**To Be Published:**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**WESTERN DIVISION**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>THONGMY THAMMAVONG,<br>Defendant. | No. CR 00-4032-MWB<br>**ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE** |

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**TABLE OF CONTENTS**

## *I. INTRODUCTION AND FACTUAL BACKGROUND*

On March 24, 2000, defendant Thongmy Thammavong and co-defendant Minh Van Nguyen were charged in a one count indictment with conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). Assistant Federal Public Defender Jeffrey A. Neary[1] was appointed to represent defendant Thongmy Thammavong. On April 3, 2000, Thammavong pleaded not guilty at his arraignment.

On November 28, 2000, defendant Thammavong attempted to enter a plea of guilty before United States Magistrate Judge Paul A. Zoss. During the attempted plea taking Thammavong indicated he was having difficulty understanding the proceedings and that there was some problem with the translation.[2] Judge Zoss adjourned the proceedings in order that the court could arrange to have a certified interpreter present to interpret for Thammavong. On January 16, 2001, with the assistance of a certified interpreter, defendant Thammavong pleaded guilty to one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine.

At his sentencing, defendant Thammavong was again provided the services of a certified interpreter to interpret the proceedings. During the sentencing, the government

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[1] On January 6, 2003, Jeffrey Neary was appointed District Court Judge for the State of Iowa, Third Judicial District.

[2] The minutes from this hearing, however, indicate that the interpreter was sworn in to interpret in Laotian, Thammavong's native language.

withdrew its request for a gun enhancement, U.S.S.G. § 2D1.1(c)(2), and asked the court to disregard the gun section of the presentence investigation report and Thammavong's counsel withdrew a request for the court to consider whether Thammavong was eligible for a sentence reduction under 18 U.S.C. § 3553(f)(5) ("safety valve").[3] At this time, Thammavong's appointed counsel also made a motion for downward departure which addressed the issue of possible indefinite detention, to which the government objected.

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[3] (f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. 355 (f)(5).

The court sentenced defendant Thammavong to 135 months then granted a 12-month conditional departure to reflect the extra 90-day detention plus the diminished ability of the defendant to be incarcerated in a lower-security facility or to be assigned to a halfway house. Thammavong was sentenced, conditionally, to 123 months incarceration. The court noted that in the event the United States established relations with Laos at the end of Thammavong's term of incarceration that Thammavong's 12-month departure would be null and void and he would be required to serve a total of 135 months. Defendant Thammavong did not appeal his sentence or conviction.

Pursuant to 28 U.S.C. § 2255, defendant Thammavong filed his *pro se* Motion To Vacate, Set Aside Or Correct Sentence which is presently before the court. Defendant Thammavong raises the following claims in his § 2255 motion: that his counsel was ineffective for failing to adequately explain the plea agreement; that his counsel was ineffective for failing to explain that a plea of guilty would result in an immigration and naturalization service hold, which, based on his citizenship, might provide for indefinite detention; that counsel was ineffective for failing to pursue a safety valve proffer in the event he became eligible for an additional two point reduction; that counsel was ineffective for failing to ask for a continuance of the sentencing in order to pursue safety valve eligibility; and, that counsel was ineffective for failing to determine that the interpreter was not adequately or precisely interpreting court proceedings, in that the interpreter was interpreting in Thai and defendant Thammavong only speaks Laotian. Defendant Thammavong also filed a motion requesting an evidentiary hearing on these claims. After reviewing the record, the court granted defendant Thammavong's request for an evidentiary hearing. On June 27, 2003, Thammavong's evidentiary hearing was held. Thammavong was present and was represented by Craig Cascarano, Cascarano Law Office, Minneapolis, Minnesota. Assistant United States Attorney Jamie Bowers

represented the government. Both lawyers were superb advocates at the hearing.

## *II. LEGAL ANALYSIS*

### *A. Standards Applicable To § 2255 Motions*

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

*Id*. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United*

*States*, 112 F.3d 365, 366 (8th Cir. 1997) (*per curiam*). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). Thammavong readily acknowledges that none of the claims presented in his § 2255 motion were raised on appeal. Although Thammavong does not clearly indicate why this procedural default should be excused, the court liberally construes his *pro se* motion to assert that his procedural default should be excused because it was the result of alleged ineffective assistance of counsel.

### *B. Ineffective Assistance Of Counsel*

A defendant alleging ineffective assistance of counsel in the context of a § 2255 motion must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of the deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Apfel*, 97 F.3d at 1076; *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Strickland*, 466 U.S. 697 (stating "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); *Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The second part of the test is slightly modified where the conviction was entered on the basis of a guilty plea. "In the guilty plea context, the convicted defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to

trial.'" *United States v. Matthews*, 114 F.3d 112, 114 (8th Cir. 1993) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)), *cert. denied*, 522 U.S. 1064 (1998); *accord United States v. Prior*, 107 F.3d 654, 661 (8th Cir.), *cert. denied*, 522 U.S. 824 (1997).

Thammavong must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In viewing a claim of ineffective assistance, a court grants a strong presumption in favor of counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

*Id.* at 689. In addition to showing that his counsel's assistance was ineffective, Thammavong must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see Craycraft*, 167 F.3d at 454. Here, Thammavong asserts that but for his counsel's ineffective assistance the outcome of his sentencing would have been different. However, in determining whether counsel's conduct was objectively reasonable, the court must keep in mind that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Nguyen v. United States*, 114 F.3d 699, 703-04 (8th Cir. 1997). With these standards in mind, the court now turns to its consideration of the issue of ineffective assistance of counsel as raised by Thammavong in his § 2255 motion.

### *C. Analysis Of Issues*

#### *1. Explanation of plea agreement*

The court initially takes up defendant Thammavong's contention that his counsel failed to adequately explain the plea agreement. The record shows that Thammavong, an interpreter and the Assistant Federal Public Defender met on June 27, 2000, September 21, 2000, and November 9, 2000 to discuss the plea agreement. On November 28, 2000, Thammavong attempted to plead guilty before Magistrate Judge Paul A. Zoss. Tom Lovan was sworn in as the interpreter. During this plea hearing the defendant stated that he did not understand one of the elements the government would have to prove:

> THE COURT: The fourth thing the government would have to prove beyond a reasonable doubt is that you and the others in the conspiracy conspired to distribute 500 grams or more of a mixture or substance containing methamphetamine. Do you understand that? Do you understand that?
>
> THE DEFENDANT: Can you repeat?
>
> THE COURT: That is good. I want to make sure you understand everything we go over. The last thing they have to prove it that you're responsible for, as a matter of law, 500 grams or more of methamphetamine. You should understand that if your responsibility as a coconspirator is for less than 500 grams, the sentencing consequences Mr. Bowers told you about wouldn't be correct. In order to have the sentence he has talked to you about, and then I'll go over with you again, the government would have to prove beyond a reasonable doubt that you are responsible for 500 grams or more of a mixture or substance containing methamphetamine. In order to sentence you under the sentencing provisions the government has talked about in your plea agreement, the government would have to prove beyond a reasonable doubt that you are responsible in your conspiracy for 500 grams or more of methamphetamine that was distributed. Do you understand that now?
>
> THE DEFENDANT: Yes.

> THE COURT: Is that true? To your knowledge was there 500 grams or more of methamphetamine distributed by you and Mr. Nguyen and Mr. Barnett in the course of this conspiracy?
>
> THE DEFENDANT: I don't understand.

Transcript of Attempted Plea Taking, Doc. No. 101 at 21-22.

The court recessed in order for Thammavong's attorney to discuss the element with him. When court resumed, the court asked if Thammavong's attorney would like to recess and continue at a later date with a certified interpreter. Thammavong's attorney stated he would be more comfortable adjourning and continuing at a later date with a certified interpreter. Transcript of Attempted Plea Taking, Doc. No. 11 at 23-24. The court continued Thammavong's plea hearing until a certified interpreter could be obtained. On January 16, 2001, a second plea hearing was conducted. Edmund Ngeun Channita, a certified interpreter, was sworn to interpret English into Laotian. Transcript of Plea Taking, Doc. No. 104 at 2. The interpreter participated by speaker phone and the parties stated on the record that this arrangement was satisfactory. Transcript of Plea Taking, Doc. No. 104 at 2. During the plea hearing counsel stated to the court that he believed Thammavong understood the plea agreement:

> THE COURT: Now, I'll ask you, Mr. Neary, do you believe your client understands the plea agreement?
>
> MR. NEARY: I believe he does, Judge. By way of some additional explanation, I gave the plea agreement in a draft form to Mr. Thammavong so that he could have it reviewed with him at his leisure with Miss Toui Lo. She's the person that we've used to help us communicate when things got complicated with Mr. Thammavong. We had probably three different meetings on it, and I believe two of those were with the assistance of Ms. Lo, and I explained things, and she assisted in communicating things that were more complex, and I answered many of his questions, and so I believe he understands the plea agreement.

> THE COURT: Mr. Thammavong, do you understand that the plea agreement requires you to plead guilty to the indictment?
>
> THE DEFENDANT: I do.

Transcript of Plea Hearing, Doc. No. 104 at 16-12. An interpreter, who Thammavong's family provided to interpret the plea agreement in his native language and who spoke Thammavong's native language, read the entire plea agreement to Thammavong. This fact was discussed at the hearing:

> THE COURT: Now, let me ask you, has somebody read the entire plea agreement to you in your native language?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And who read that to you?
>
> THE DEFENDANT: Toui Lo.
>
> THE COURT: And is that a relative or friend of yours?
>
> MR. NEARY: Yeah, it's an acquaintance of Mr. Thammavong, and she is here in the audience as well.
>
> . . .
>
> THE COURT: And, Mr. Thammavong, did you understand Miss Toui Lo when she was interpreting the plea agreement for you?
>
> THE DEFENDANT: I do.
>
> THE COURT: And, Miss Toui Lo, I'll ask you at this time, did you understand the English words that you were translating into Mr. Thammavong's language at the time you interpreted the plea agreement for him?
>
> Ms. Toui Lo: Yes, I do.
>
> THE COURT: And was Mr. Neary present while this was being read to him?
>
> MS. TOUI LO: Yes, sir.
>
> THE COURT: And was Mr. Neary able to answer all of his questions as you went through the plea agreement?

MS. TOUI LO: Yes.

THE COURT: Do you have any doubt at all that Mr. Thammavong understands everything in this plea agreement?

MS. TOUI LO: I believe that he understood.

Transcript of Plea Taking, Doc. No. 104 at 9-10.

Further, during the course of the plea hearing, Thammavong stated he understood the plea agreement:

THE COURT: And do you with the advice of counsel accept the terms of the plea agreement?

THE DEFENDANT: Could the court repeat again, please?

THE COURT: Do you agree to the plea agreement?

THE DEFENDANT: Yes.

THE COURT: And do you with the advice of counsel accept the terms of the plea agreement?

THE DEFENDANT: Could the court repeat again, please?

THE COURT: Do you agree to the plea agreement?

THE DEFENDANT: Correct.

Transcript of Plea Taking, Doc. No. 104 at 9-11.

The court concludes that Thammavong's claim that appointed counsel failed to adequately explain the plea agreement is contradicted by appointed counsel's statements, the interpreter's statements, and by defendant Thammavong's own statements. The record of the plea hearing indicates that the plea agreement was explained to Thammavong in his native language. Thammavong's allegation fails to overcome the "strong presumption of verity" that attaches to statements made in "open court." *Nguyen v. United States*, 114 F.3d 699, 704 (8th Cir. 1997) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). The court concludes that Thammavong's assertion that he was provided with ineffective assistance of counsel, as to this issue, is flatly contradicted by his contemporaneous

statements made at the plea hearing. The record at the hearing reflects Thammavong's admissions that he had been informed of and understood the contents of the plea agreement to which he was pleading guilty. The court has no trouble in determining that Thammavong has failed to show that he received ineffective assistance of counsel as to the claim that counsel failed to adequately explain the plea agreement because the record is replete with statements made in open court and on the record by counsel, the interpreter provided by Thammavong, and by Thammavong himself, that Thammavong had been read the plea agreement, and understood it. Thus, the court concludes that Thammavong has failed to show that he received ineffective assistance regarding having his plea agreement explained to him. Therefore, this portion of defendant Thammavong's motion is denied.

***2. Immigration and naturalization service hold and possible indefinite detention***

Defendant Thammavong next claims that his counsel failed to explain that a plea of guilty would result in an immigration and naturalization service ("INS") hold which, based upon his citizenship, might provide for indefinite detention. The contrary is indicated by the record. First, appointed counsel submitted an affidavit that indicates he discussed an INS hold and the possibility of indefinite detention with Thammavong from the time the case was opened until it was closed. Affidavit of Jeffrey Neary, Government Exhibit 5 at 3. The affidavit indicates that appointed counsel contacted an expert immigration lawyer, Subhash Chandra, to assist with this issue. Appointed counsel stated he had discussions with Thammavong about the possibility of deportation on a drug conviction. Affidavit of Jeffrey Neary, Government Exhibit 5, at 2-3. Second, this issue was discussed at length during the sentencing, as is evidenced by the following:

> MR. NEARY: In this case Mr. Thammavong is a refugee. What would or what could happen? What kinds of things happen to those individuals when they're done serving their time if you know?
>
> MR. CHANDRA: Okay. There's usually a two-part process.

When the person is officially done with the state time or federal time for the state or federal crime, INS places what's called a detainer on that person. With that detainer, there's no way that we can bond that person out. The person basically has to wait until INS actually picks them up. Some people out of that category will not be eligible for any type of hearing. People from Laos typically have refugee-based claims, i.e., they fear returning to their country because of what happened in the past to them. The only way that we can get them a hearing is to file what's called convention against torture because if they're aggravated felons, then they're not eligible for asylum, and it's very difficult to apply for other types of relief.

So essentially what happens is we get a hearing in front of an immigration judge. If we show that he's more likely than not to be tortured upon release, the judge will go ahead and basically stay the removal, but he won't necessarily let him go, and so he'll have to sit basically in INS custody for a long time.

Now, immigration, because of certain due process challenges, did start to launch a - - what's called a review, a custody review, which happens every now and then. In theory it's supposed to be so that someone does not sit in jail forever. In practice it's very difficult I think, although I would say personally Todd Nay I think has been a very good agent in that respect. There are other offices that don't let anyone go because you've got to show clear risk of no flight and a clear risk that he's not going to pose a risk to society. And to meet that burden just takes a surmountable bunch of evidence.

. . .

THE COURT: Okay. Mr. Thammavong, you have the right to say anything to me you want to before I impose sentence. you don't have to say anything. You have a right not to say anything, and if you decided not to say anything, I can't hold that against you in any way. But if you'd like to say something, now is the time. Is there anything you'd like to say?

Transcript of Sentencing, Doc. No. 105 at 6-43.[4] Thammavong was present during this discussion and he was provided an opportunity to address the court. Thammavong never indicated to the court that he did not understand that by pleading guilty he might be detained indefinitely. Further, it was because of appointed counsel's efforts that the court granted a conditional downward departure based on the potentially prejudicial effect of the indefinite detention. Transcript of Sentencing, Doc. No. 105 at 41-42. The record shows, and the court concludes, that Thammavong has not shown that he received ineffective assistance of counsel as to the claim that appointed counsel failed to explain that a plea of guilty would result in an immigration and naturalization service ("INS") hold which, based upon his citizenship, might provide for indefinite detention. Therefore, this portion of defendant Thammavong's motion is denied.

***3. Safety valve - the fighting issue***

The fighting issue before the court revolves around Thammavong contention that there is reasonable probability that but for ineffective assistance of counsel, *i.e.,* the failure of appointed counsel to pursue a safety valve proffer, safety valve reduction, and continuance of the sentencing in order to pursue safety valve eligibility, the outcome of his sentencing would have been different. An evidentiary hearing was held on those portions of Thammavong's motion regarding safety valve issues. The court heard testimony from Thammavong's appointed counsel, Jeffery Neary, that Thammavong, "late in the game" offered to proffer but that a proffer was not pursued prior to sentencing. Thammavong's appointed counsel testified that in "hindsight" he should have asked for a continuance to pursue safety valve eligibility and to allow Thammavong to debrief prior to sentencing. Thammavong's appointed counsel also testified that several issues were being addressed shortly before Thammavong's sentencing. These issues included a possible gun possession

[4] For complete discussion of the INS hold and possible deportation issue see pages 6-43 of the sentencing transcript.

charge, an indefinite INS hold, and a likely Rule 35(b) motion.[5] After discussions with the government and Thammavong, appointed counsel advised Thammavong to wait and

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[5] According to Rule 35(b), a district court, upon motion by the government, may consider a reduction of sentence "to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person" even more than a year "after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed." Rule 35(b) states:

> (b) Reducing a Sentence for Substantial Assistance.
> (1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:
> (A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and
> (B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.
> (2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
> (A) information not known to the defendant until one year or more after sentencing;
> (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.
> (3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.
> (4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

cooperate with California authorities and to seek a Rule 35(b) motion. Appointed counsel testified that "the issue of safety valve became clouded," and he never pursued a safety valve proffer. Thammavong followed the advice of appointed counsel and decided not to pursue a safety valve proffer and reduction but to wait and debrief with the California authorities and benefit from the likely Rule 35(b) motion. Appointed counsel testified that he believed, in good faith, at that time, that Thammavong would receive a Rule 35(b) motion. This testimony is supported by appointed counsel's affidavit:

> Prior to and shortly before sentencing, the issue of safety valve became clouded. The government was urging that the defendant was not eligible for safety valve consideration due to the fact that one cooperating witness had identified Mr. Thammavong as being in possession of a firearm that may have been related to Mr. Thammavong's possession of drugs and/or drug trafficking activity. This was going to be a contested issue at the time of sentencing. I lodged an objection to the Presentence Investigation Report's inclusion of an enhancement based upon possession of a firearm in connection with the drug trafficking offense. This was a contested issue to be resolved at the time of sentencing. If the gun enhancement would have been applied, the defendant would not have been eligible for safety valve, and a debriefing would not have gained Mr. Thammavong any benefit or been of any value to him in this matter. Mr. Thammavong was willing, and very interested in debriefing for safety valve purposes and late in the game, around the time of the sentencing, he had decided he was willing to cooperate and assist the government despite the noncooperation plea agreement
>
> The discussions that took place between the government, through Jamie Bowers, Assistant United States Attorney, and myself, included a way to resolve the gun enhancement and to continue to allow the defendant the opportunity and ability to cooperate. At or near the time of sentencing, Jamie Bowers decided to withdraw his request for the gun enhancement and he would not seek it at the time of sentencing. The transcript of the sentencing will bear out this enhancement was withdrawn and a reduction from the initially

> scored Presentence Investigation Report was accomplished at the time of sentencing. Discussions took place around the time of sentencing between Jamie Bowers and myself in relationship to Mr. Thammavong's eligibility for safety valve and his interest in cooperating, especially, with a potential related California investigation. The discussion that took place was that we would not conduct a safety valve debriefing at that time. We would let the California investigation unfold and take place and any safety valve issue would be taken care of in relationship to Mr. Thammavong's future cooperation with the state of California authorities and thus we did not press for a safety valve debriefing prior to sentencing. I fully believed that the California authorities and local authorities would continue their investigation and pursue the matter to the extent that Mr. Thammavong would be allowed to cooperate and that a Rule 35(b) motion for a reduction of his sentence would be forthcoming and very likely.
>
> . . .
>
> I did inform Mr. Thammavong of the expectation that the California investigation would proceed and that he would have the opportunity to receive a Rule 35(b) motion. I also assured him that he would have the opportunity to debrief, but not in the form of a safety valve debriefing.

Affidavit of Jeffrey Neary, Government Exhibit 5 at 3-5.

Thammavong's appointed counsel believed Thammavong would qualify for the safety valve reduction and originally did consider pursuing a safety valve reduction as indicated in the plea hearing transcript:

> THE COURT: Now Mr. Neary, I assume this isn't a safety valve case: is that correct?
>
> MR. NEARY: It may be.
>
> THE COURT: It may be. Then I'm going to correct something I just said. There's basically two ways that Judge Bennett can sentence below the mandatory ten-year minimum. One way would be if you cooperated and the government filed a motion. This is a noncooperation plea agreement, so I

> assume that's not going to be available in this case; is that correct, Mr. Bowers?
>
> MR. BOWERS: Right, Your Honor. The defendant has refused to talk with police. He hasn't debriefed.
>
> THE COURT: The other way is a safety valve. Now, to qualify for the safety valve, you have to give a full and complete statement to the government as well, and you have to satisfy a number of other requirements. So there is another way you could get sentenced below the mandatory minimum, and that is if you qualify for the safety valve. That's a hard thing to qualify for, and I'm not going to tell you that there's any certainty that you're going to qualify for the safety valve because there's not. In fact, if you refuse to give any statement at any time, it would be almost impossible to qualify for safety valve.

Transcript of Plea Hearing, Doc. No. 104 at 28-29.

As stated in appointed counsel's affidavit, discussions took place around the time of sentencing between the government and Thammavong's appointed counsel as to Thammavong's safety valve eligibility and his interest in cooperating. This discussion is reflected in the sentencing transcript:

> THE COURT: And my understanding is that there have been some changes in the presentence report based on a stipulation or I guess a change in position of the U.S. Attorney's office; is that correct?
>
> MR. BOWERS: That's right, Your Honor. And I believe a change in the situation with the public defender also here. It's kind of a mutual agreement that we won't be arguing about the safety valve issue here today, and also the government will not present any evidence with regard to the defendant's possession of a gun during the offense, so there would be no argument about the gun enhancement. We withdraw that and ask the Court to disregard the gun section of the presentence investigation report.
>
> THE COURT: And that would be paragraph 41 of the

> presentence report?
>
> MR. BOWERS: That's right.
>
> THE COURT: So instead of having a - - the effect would be paragraph 41 would be a 0 rather than plus 2, and the effect is that the total offense level instead of being a 35 would now be a 33; is that correct, Mr. Bowers?
>
> MR. BOWERS: That's right.
>
> THE COURT: And the defendant's guideline range would drop from 168 to 210 months down to 135 to 168 months with a total offense level of 33 adjusted downward from 35 and a criminal history category 1; is that correct?
>
> MR. BOWERS: That's right, Your Honor.
>
> THE COURT: Okay. And you've indicated to me that the defendant then has withdrawn his request to have me consider whether or not the defendant is safety valve eligible; is that correct?
>
> MR. BOWERS: That's my understanding, Your Honor, yes, sir.

Transcript of Sentencing, Doc. No. 104 at 2-3.

Thammavong's appointed counsel admits that, "prior to and shortly before sentencing, the issue of safety valve became clouded" (Affidavit of Jeffrey Neary, Government Exhibit 5 at 3) and that, "[i]n regard to these two grounds, Mr. Thammavong was safety valve eligible, in my opinion." Affidavit of Jeffrey Neary, Government Exhibit 5 at 3. Thammavong's present counsel, Craig Cascarano, argued during the evidentiary hearing that the "more zealous" and "better approach" would have been to ask for a continuance and to pursue safety valve eligibility.[6] The government argued that Thammavong's appointed counsel's decision was reasonable and did not rise to the level

[6] The court wants to recognize Mr. Cascarano for his superior advocacy during oral arguments. This type of representation is rare and should be commended.

of ineffectiveness.

As previously stated, there are two prongs a petitioner must satisfy to prevail on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. It is not necessary to address counsel's performance and the prejudice prong in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one of the prongs. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir.1999) (citing *Strickland*). In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir.2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)).

***a. Prejudice.*** The court will first consider whether Thammavong was prejudiced when his appointed counsel failed to seek a safety valve proffer, reduction and failed to ask for a continuance to pursue safety valve eligibility. Regardless of whether Thammavong could show counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Thammavong must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Application of the safety valve provision, which contains five eligibility criteria, would have the effect of dispensing with the ten-year (120 month) mandatory minimum

sentence that applies to the offense for which Thammavong was convicted. The safety valve is a method of eliminating from sentencing consideration of a mandatory minimum, which provides the lowest level below which a sentencing judge cannot depart, even if the applicable Sentencing Guidelines call for a shorter sentence. Therefore, if the safety valve reduction applies, a court may sentence a defendant below the mandatory minimum. The usual situation is that the statutory mandatory minimum provides the sentence below which a sentencing judge cannot depart even if the applicable Sentencing Guideline range is less than the mandatory minimum. In Thammavong's case, assuming the court would have determined that Thammavong satisfied the stringent eligibility criteria to warrant a safety valve reduction (which is by no means a foregone conclusion), there is a reasonable probability that the outcome of Thammavong's sentencing would have been different and that his sentencing was fundamentally unfair.

Thammavong's conviction carried a ten-year (120 month) mandatory minimum sentence. At sentencing, the court held that Thammavong's base offense level was 33 and his criminal history category was 1 for a Sentencing Guideline range of 135 to 168 months. The court sentenced Thammavong to 135 months and granted, conditionally, a 12-month downward departure based upon Thammavong's INS hold. Thammavong was, conditionally, sentenced to 123 months. There were many factors considered when this court sentenced Thammavong, such as the government's withdrawal of the gun possession charge, the withdrawal of a safety valve reduction, and Thammavong's INS hold. However, if the safety valve's two-point reduction would have been applied, Thammavong's base offense level would have changed to 31 and his Sentencing Guideline range to 108-135.[7]

[7] The court acknowledges that the record shows that Thammavong indicated he did not want to proffer without protection for his family and later because his co-defendant was not in custody. However, the record also reflects that Thammavong was given several (continued…)

The prejudice prong of *Strickland* requires Thammavong to show there was an actually adverse effect, not just that appointed counsel's errors had some conceivable effect on the outcome of the proceeding because arguably every act or omission of counsel would meet such a test. *See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir.1999) (*citing Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir.1997)). As stated above, Thammavong must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Thammavong has demonstrated that there is a reasonable probability that the outcome of his sentencing would have been different. There is certainly a reasonable probability that Thammavong's sentence would have been lower than the sentence he actually received had he been found to be safety valve eligible. Having sentenced him to the low end of the guideline range without safety valve eligibility there is a strong likelihood that he would have received the low end of his revised safety valve guideline range given my inclination and history of usually sentencing safety valve eligible defendants to the low end of their respective guideline range unless significant factors require a different result. I know of no such factors in this case. Therefore, Thammavong has met this prong. The court will now turn to the second prong and consider appointed counsel's performance.

***b. Appointed counsel's performance.*** In order for this court to find ineffective assistance of counsel, as to the safety valve issue, Thammavong must demonstrate not only prejudice but that his counsel's performance was not objectively

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[7](…continued)
opportunities to proffer and waited until shortly before sentencing to indicate he would be willing to proffer.

reasonable. If both prongs are not met the court cannot find ineffective assistance of counsel as to this claim.

The court begins by observing that "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S.Ct. at 2067. Thammavong's argument that his appointed counsel's performance was unreasonable is colored too much by "perfect hindsight," and without sufficient regard to the circumstances as they existed at the time of sentencing. Whether it was a reasonable strategic decision to advise Thammavong to wait and debrief later and receive a Rule 35(b) motion is a decision that appointed counsel made based on the information he had at the time. Appointed counsel reasonably believed that the California investigation would proceed and that Thammavong would have the opportunity to receive a Rule 35(b) motion. "The decision to proceed in this manner was a decision of counsel and the defendant followed the advice of counsel." Affidavit of Jeffrey Neary, Government Exhibit 5 at 5. In hindsight, appointed counsel now realizes he should have pursued both a safety valve and a Rule 35(b) motion but this does not make his decision and performance at that time unreasonable. Even if appointed counsel's advice was ultimately wrong, this does not mean it was deficient. This said, the court would emphasize that it is highly advisable to seek a safety valve reduction, if the defendant qualifies, because unlike a Rule 35(b) motion, the safety valve is not dependent on the discretion of the United States Attorney's office. Further, depending on the circumstances, failure to seek a safety valve proffer, when a defendant requests his or her counsel to seek safety valve eligibility, could justify a finding of ineffective assistance of counsel. As the Eighth Circuit Court of Appeals has found, depending on the circumstances, even if the request to proffer comes "late" the courts should not apply a rigid rule to any safety valve relief and a safety valve can apply to the hearing at which the defendant is actually sentenced. *United States v. Madrigal*, 327 F.3d 738 (8th Cir. 2003). Indeed, this district

court judge has a well established history of continuing sentencings in order to allow defendants to pursue safety valve eligibility.[8]

Although razor thin, with respect to the appointed counsel's conduct, there exists a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appointed counsel's challenged conduct is to be evaluated in light of the circumstances surrounding the decision, not with the 20/20 vision of hindsight. *Id*. Certainly there is the possibility that different counsel might have chosen to press for both a safety valve reduction and a Rule 35(b) motion, and such a choice would have been reasonable.[9] It does not follow that the opposite choice — not to purse a safety valve proffer and reduction — was unreasonable. "Law is an art, not a science, and many questions that attorneys must decide are questions of judgment and degree." *Garrett v. United States*, 78 F.3d 1296, 1306 (8th Cir. 1996). On these facts, and though a close

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[8] The government has previously challenged this court's decision to award a safety valve deduction after continuing a sentencing in order to allow the defendant to pursue safety valve eligibility. The court's decision was affirmed on appeal. In *United States v. Madrigal*, the Eighth Circuit Court of Appeals found that "when a federal district court judge for good cause and in the interests of justice continues a sentencing hearing" the judge does not "lose the discretion to grant an offender, who is qualified at the time of imposition of the sentence, a statutory safety valve deduction from a mandatory minimum." The Eighth Circuit Court of Appeals determined that the court has discretion because "the statutory phrase for qualification for the safety valve is 'not later than the time of sentencing hearing.' §18 U.S.C. 3553(f)(5). This provision does not deprive the district court in an appropriate case, such as this one, from continuing the hearing and in the court's discretion imposing a sentence below the mandatory minimum under the safety valve." *United States v. Madrigal,* 327 F.3d at 738.

[9] As observed during the evidentiary hearing, this Judge and counsel for the defendant, with the wisdom of hindsight, both would like to think that they would have pursued a safety valve reduction, but, this is with the knowledge that the Rule 35(b) motion will likely not be an option for Thammavong.

call, Thammavong has failed to show that appointed counsel's representation fell below an objective standard of reasonableness. Appointed counsel reasonably believed, as did counsel for the government, that Thammavong would be able to pursue a Rule 35(b) motion. The court finds that appointed counsel's decision not to pursue a continuance and safety valve eligibility was objectively reasonable. Thammavong has failed to meet both prongs. Therefore, Thammavong's motion as to the safety valve issue is denied.

***4. Alleged failure of counsel to determine the interpreter was not adequately or precisely interpreting court proceedings***

Defendant Thammavong argues counsel failed to determine that the interpreter was not adequately or precisely interpreting court proceedings. A review of the record indicates the defendant provided his own interpreter to assist counsel with interpreting the plea agreement, and to assist with communications during discussions between the defendant and counsel prior to the plea hearing. The record also indicates that during the attempted plea taking counsel and the court agreed that a certified interpreter should be used because the defendant indicated to the court that he was having difficulty understanding. Transcript of Attempted Plea Taking, Doc. No. 101 at 20-24. During the plea hearing, a certified interpreter was sworn to interpret English into Laotian. Transcript of Plea Hearing, Doc. No. 104 at 2. During the proceeding the court inquired whether the defendant was having any difficulty understanding the interpreter or the proceedings. The court stressed during the plea hearing that the defendant should inform the court if he was having difficulty understanding. During the proceedings the defendant did not indicate to his counsel or the court that he was having difficulty understanding the interpreter.

> THE COURT: And will you let me know if at any time you have trouble understanding anything either because there's a problem with interpretation or just because you don't understand what's happening? Will you let me know?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And are you having any difficulty at all

understanding what the interpreter is saying to you?

THE DEFENDANT: No.

Transcript of Plea Hearing, Doc. No. 104 at 3-4.

Additionally, during the sentencing, a certified interpreter was sworn to interpret English into Laotian. Transcript of Sentencing, Doc. No. 105 at 2. There was no indication by the defendant to either his counsel or to the court that the interpreter was not interpreting in Laotian or that the defendant was not understanding the interpreter. On these facts, the court cannot say that trial counsel was ineffective for failing to determine that the interpreters were not adequately or precisely interpreting court proceedings. Therefore, this portion of defendant Thammavong's motion is denied.

### *D. Certificate of Appealability*

Thammavong must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these issues. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. With respect to Thammavong's claim of ineffective assistance of counsel as to the safety valve issue, the court shall grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

## *III. CONCLUSION*

The court has considered each of the grounds raised during oral arguments and in Thammavong's motion pursuant to 28 U.S.C. § 2255, and for the reasons set forth above,

concludes that Thammavong is not entitled to have his sentence corrected. Therefore, Thammavong's motion under 28 U.S.C. § 2255 is denied. However, the court determines that the petition does present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will issue as to the safety valve issue.

**IT IS SO ORDERED.**

**DATED** this 4th day of September, 2003.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA